

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34946

STATE OF IDAHO,)	2009 Unpublished Opinion No. 438
)	
Plaintiff-Respondent,)	Filed: April 29, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
GERARDO A. DAVILA,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Thomas J. Ryan, District Judge. Hon. Debra A. Orr, Magistrate.

Appeal from the order of the district court affirming the magistrate court's judgment of conviction, affirmed.

Canyon County Public Defender; Thomas A. Sullivan, Caldwell, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Thomas Tharp, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Gerardo A. Davila appeals from the district court's decision, sitting its appellate capacity, affirming the judgment of the magistrate court, entered upon a jury verdict finding Davila guilty of domestic battery in the presence of children. Idaho Code §§ 18-903 and 18-918(3)(b). We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

Davila was charged with domestic battery, I.C. §§ 18-903 and 18-918(3)(b), as enhanced by commission of the offense in the presence of children under sixteen years of age.¹ These charges stem from an incident involving Davila and his wife Esmeralda Davila in the parking lot

¹ Davila was also charged with intentional destruction of a telephonic device, I.C. § 18-306 and I.C. § 18-6810, but was acquitted of that charge.

of the Karcher Mall in Nampa, Idaho. At the time of these events, Esmeralda was living at the Valley Crisis Center due to past allegations that Davila abused her and her children. On the morning of trial, Davila moved to exclude testimony that Esmeralda was living at the Valley Crisis Center and to exclude testimony of any prior instances of abuse by Davila against Esmeralda or the children. The State did not contest the motion to exclude prior instances of abuse. The magistrate granted the motion, and that motion is not directly at issue on this appeal. The magistrate also granted the motion to exclude testimony that Esmeralda was living at the Valley Crisis Center, but stated that testimony that she was living at a shelter home, without explanation as to the type of shelter home, would be allowed.

The jury found Davila guilty of domestic battery committed in the presence of children. Davila appealed to the district court contending that the magistrate erred in allowing testimony that Esmeralda was living in a “shelter home.” The district court affirmed the judgment and conviction entered by the magistrate. This appeal followed.

II. ANALYSIS

On review of a decision of the district court, rendered in its appellate capacity, we review the decision of the district court directly. *State v. DeWitt*, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008). We examine the magistrate record to determine whether there is substantial and competent evidence to support the magistrate’s findings of fact and whether the magistrate’s conclusions of law follow from those findings. *Id.* If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate’s decision, we affirm the district court’s decision as a matter of procedure. *Id.*

The trial court has broad discretion in determining the admissibility of testimonial evidence. *State v. Smith*, 117 Idaho 225, 232, 786 P.2d 1127, 1134 (1990). A decision to admit or deny such evidence will not be disturbed on appeal absent a clear showing of abuse of that discretion. *Id.* When a trial court’s discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

As an initial matter, the State contends that there is no adverse ruling for this Court to review and that Davila failed to preserve the issue for appeal. The State argues that Davila obtained a favorable decision on his motion and, thus, there is no ruling unfavorable to him for this Court to review or reverse. Davila's motion to exclude testimony that Esmeralda was living at the Valley Crisis Center was granted. While Davila argued that because the Valley Crisis Center is exclusively a shelter for battered women and evidence that Esmeralda lived there would be prejudicial and intertwined with prior bad acts, Davila did not ask for a ruling excluding any reference to her residence or to her residence in a "shelter home." This Court will not review a trial court's alleged error on appeal unless the record discloses an adverse ruling which forms the basis for the assignment of error. *State v. Barnett*, 133 Idaho 231, 235, 985 P.2d 11, 15 (Ct. App. 1999). In addition, the State argues that Davila failed to preserve the issue for appeal. After ruling the testimony that Esmeralda was living at the Valley Crisis Center would not be allowed, the magistrate ruled that testimony regarding Esmeralda living in a shelter home, without reference to the type of shelter home, would be allowed. Davila made no objection to the magistrate's ruling regarding residence in a shelter home. This Court will not address an issue not preserved for appeal by an objection in the trial court. *State v. Rozajewski*, 130 Idaho 644, 645, 945 P.2d 1390, 1391 (Ct. App. 1997). Although we agree that Davila did not move to exclude all evidence of residency and did not object to the magistrate allowing testimony of residency in a shelter home, it is unclear from the record whether these issues were raised by the State on the appeal to the district court. The record does not contain the briefs of the parties on the appeal to the district court and the court's decision does not address these issues. Therefore, we will address the issue of the admission of testimony that Esmeralda was living in a shelter home.

Davila objected to testimony that Esmeralda was living at the Valley Crisis Center on the grounds the information was irrelevant under Idaho Rule of Evidence 401 and that its prejudicial effect outweighed any probative value, I.R.E. 403. In addition, Davila claimed that evidence Esmeralda lived at the Valley Crisis Center, "a shelter for battered women," implicated prior bad acts on the part of Davila, excludable under I.R.E. 404(b). The magistrate agreed, without reference to the specific rules, that potential prejudice from testimony that Esmeralda lived at the Valley Crisis Center exceeded any probative value. The magistrate expressly rejected prior bad acts testimony. It is implicit in the magistrate's determination that limiting reference to a

“shelter home,” without indication of the type of shelter home, was sufficient to negate any inference of prior bad acts by Davila. The district court, on appeal, did not review the question of testimony regarding the Valley Crisis Center, but, instead, only addressed the propriety of allowing testimony that Esmeralda was living in a shelter home. The district court held that the evidence was irrelevant but, due to the overwhelming evidence in the record to support the verdict, its admission did not affect the substantial rights of the defendant and, thus, was harmless error. Idaho Criminal Rule 52; I.R.E. 103. The district court also concluded that the use of the term “shelter” did not sufficiently implicate prior bad acts to warrant exclusion under I.R.E. 404(b).

The district court noted that the State had conceded that the trial court erred in permitting testimony that Esmeralda was residing in a shelter as it was irrelevant. This concession can only have been made in the State’s brief on the appeal to the district court, which, as noted, is not part of the record on appeal to this Court.² The State, in its brief to this Court, argues only harmless error. Error is not reversible unless it is prejudicial. *State v. Stoddard*, 105 Idaho 169, 171, 667 P.2d 272, 274 (Ct. App. 1983). With limited exceptions, even constitutional error is not necessarily prejudicial error. *Id.* Thus, we examine whether the alleged error complained of in the present case was harmless. *See State v. Lopez*, 141 Idaho 575, 578, 114 P.3d 133, 136 (Ct. App. 2005). To hold an error harmless, this Court must declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that the evidence complained of contributed to the conviction. *State v. Sheldon*, 145 Idaho 225, 230, 178 P.2d 28, 33 (2008).

We agree with the district court that any error in the admission of testimony that Esmeralda was living in a shelter home was harmless. Esmeralda and her friend testified that Davila grabbed Esmeralda from the back and squeezed her stomach and that as Esmeralda was trying to get into her vehicle, Davila was pulling on her arms and hands. Esmeralda testified that Davila put his knee into her back. The police officer that interviewed Davila testified that he admitted touching Esmeralda, without apparent permission. The fact that the jury asked to see the police report and for a definition of unlawful touching, does not undermine the overwhelming weight of the evidence supporting the verdict. Coupled with the fact that the jury

² The State points to the district court’s decision and acknowledges that, while it believes the evidence is relevant, it “apparently” conceded that it was not relevant on the appeal to the district court.

acquitted Davila on one charge, these requests demonstrate that the jury thoughtfully considered the evidence and the instructions of the court, as opposed to somehow holding against Davila the fact that Esmeralda was living in a shelter home.

III.

CONCLUSION

Any error in admitting testimony that Esmeralda was living in a shelter home was harmless. Due to the overwhelming weight of the evidence supporting the jury verdict, beyond a reasonable doubt, there was no reasonable possibility that the evidence complained of contributed to the conviction. The judgment of conviction is affirmed.

Judge PERRY, **CONCURS.**

Chief Judge LANSING **CONCURRING IN THE RESULT.**

I would hold that the issue raised by Davila was not preserved for appellate review because Davila received no adverse ruling from the trial court and did not object to the magistrate's ruling allowing evidence that Esmeralda lived in a shelter. Therefore, I concur in the Court's affirmance of the judgment of conviction.